No. 2917.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco, Who is Now Succeeded by EDWARD WHITE, as Commissioner of said Port,

Appellant,

vs.

HARRY KATZ,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLEE

MARSHALL B. WOODWORTH,
Attorney for Appellee.

Filed this.....day of March, A. D. 1917.

FRANK D. MONCKTON, Clerk.

By....., Deputy Clerk.

Rincon Pub. Co., 689 Stevenson St., S. F.

No. 2917.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT.

SAMUEL W. BACKUS, as Commissioner of Immigration at the Port of San Francisco, Who is Now Succeeded by EDWARD WHITE, as Commissioner of said Port,

Appellant,

vs.

HARRY KATZ,

Appellee.

REPLY BRIEF ON BEHALF OF APPELLEE

STATEMENT OF THE CASE.

The appellee having been ordered deported, sued out a petition for a writ of *habeas corpus,* a demurrer was interposed, which was overruled, and thereafter a return was filed, and, after a hearing, the appellee was discharged by the Court below on the ground of the absolute insufficiency of any evidence "that he has been found connected with the management of a house of prostitution; and that he has been found re-

ceiving, sharing in, or deriving benefit from the earnings of a prostitute, or prostitutes." (See Transcript of Record, p. 15.)

The appellant seeks a review of what is claimed to constitute evidence, but which, in reality, simply consist of surmises, conjectures, suspicions, rash inferences, and other matters not amounting to *competent evidence.*

Needless to say, that surmise, conjecture, rash inference, or even mere probabilities, do not afford a substitute for *some competent evidence,* upon which to inflict on an alien, who has sought an asylum in this country, such drastic punishment as banishment.

As was said in *Hanges* v. *Whitfield,* 209 Fed. Rep. 675, *679-680*: The examination "must be a lawful proceeding, the charge established by *competent evidence,* and the aliens afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them." * * * "and but emphasizes the necessity of Immigration Officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported, *except upon legal evidence,* which establishes, with reasonable certainty, at least, the charges upon which it is sought to deport them."

As was also well said in *Ex parte Lam Pui,* 217 Fed. Rep. 456:

> "It is also elementary that mere suspicion, conjecture, speculation is not evidence, neither can it be made the basis for finding a fact in issue."

This Circuit Court of Appeals announced the same

views in *Backus* v. *Owe Sam Gow,* 235 Fed. Rep. 847, *853-4:*

> "But mere suspicion or conjecture were not sufficient upon which to base a judgment * * * In the absence of the best evidence obtainable to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and subject to judicial inquiry. (Citing *United States* v. *Ju Toy,* 198 U. S. 253, 260, 25 Sup. Ct. 644, 40 L. Ed. 1140; *Chin Yow* v. *United States,* 208 U. S. 8, *12*, 28 Sup. Ct. 201, 52 L. Ed. 369; *In re Chan Kan,* 332 Fed. 855, 857, — C. C. A., and cases therein cited.)"

Counsel for appellant set out in full in their Opening Brief those affidavits, reports and other documents upon which they rely to justify a reversal of the decision of the court below. In fact, almost their entire brief is taken up with copies of these documents.

It is, therefore, at the outset, highly important to ascertain the views of the learned Judge of the court below when he decided that there was "no real evidence against the petitioner."

We insert his opinion in full:

> "The records here which accompany the petition show *no real evidence against the petitioner. The affidavits are upon information and belief, and express only the opinions of the affiants.* It is true that in this State the reputation of a house as a house of ill-fame, may be shown, but I know of no rule, here or elsewhere, which permits the ownership or management of such a house to be thus proved. There should be, in my opinion, some *fair, substantial testimony* upon which to base an order deporting from this country an

alien who has lawfully entered it. The record here is too long to recite, but the closest scrutiny of it will not reveal in all the testimony taken, whether in the presence or absence of petitioner, *any competent evidence,* and by that I mean evidence *other than pure hearsay and expressions of opinion,* tending to support the finding that petitioner was *either connected with the management of a house of prostitution or has been found receiving, sharing in, or deriving benefit from the earnings of a prostitute or prostitutes.* It may be true that the presence of petitioner in this country is displeasing to many worthy people, but he may not be deported for that reason. He can only be deported after *a fair hearing,* and then only when the order deporting him finds support in something other than *mere hearsay and opinion.* The demurrer to the petition will be overruled, and a writ will issue returnable December 11th, 1915, at 10 o'clock a. m.

"November 26th, 1915.

"M. T. DOOLING, Judge.

"(Endorsed): Filed Nov. 26, 1915. W. B. Maling, Clerk.

"By C. W. Calbreath, Deputy Clerk." (Italics ours.)

(Transcript of Record, pp. 14-15.)

The demurrer to the petition for a writ of *habeas corpus* having been overruled, the appellant filed a return to the writ. After a hearing thereon, the learned Judge of the court below decided:

"The return to the writ of *habeas corpus* herein presents no question either of law or of fact that was not urged and considered upon the demurrer to the petition. I am satisfied with the conclu-

sions reached at that time, and it is therefore ordered that petitioner be discharged.

"January 13th, 1916.

"M. T. DOOLING,
"Judge."

(Transcript of Record, p. 31.)

Before answering appellant's brief, it is proper to state that another appeal, now pending before this Honorable Court in case No. 2812, *Joseph B. Katz, appellant,* v. *Commissioner of Immigration at the Port of San Francisco, California, appellee,* is a companion case.

Joseph B. Katz and the appellee in this case, Harry Katz, are brothers. Two separate warrants of arrest were issued against them, as well as two separate warrants of deportation. Separate affidavits claimed to support the warrants of arrest were issued against each of the brothers and separate preliminary hearings before the Immigration Officers were held as to each brother and thereafter the hearings of each brother were separately conducted until the hearing held on SEPTEMBER 2, 1914, when the evidence or alleged evidence against both brothers was jointly presented and the affidavits and other alleged evidence made applicable to both insofar as the context and tenor of the affidavits and other alleged evidence, upon their face, applied to both brothers.

Substantially the same so-called evidence was introduced against both brothers.

Joseph Katz was ordered deported, and the Court below affirmed this order *solely and only* for the reason that he admitted that he owned the house and

land, which was used as a place of ill-fame; that he was the landlord and Nellie White the tenant, that is, that the only relation that existed between them was that of landlord and tenant; and that he received a monthly rental of $25, which was a reasonable rent, and received said sum only for rent as landlord and *in no other capacity*. Proof that Joseph Katz was otherwise interested in this house of prostitution was equally as glaringly deficient as it was against his brother Harry Katz, who, as we have seen, was ordered discharged on *habeas corpus* by the learned Judge of the Court below because of the insufficiency of the evidence.

So that, we perceive that Joseph Katz was held subject to deportation purely on a question of law, which is, Does Section 3 of the Act of February 20, 1907 (34 Stats. 898), as amended by the Act of March 26, 1910 (36 Stats. 263), apply to alien landlords who receive money from prostitutes *simply and only* as rent and *in no other capacity or relation?* This question is somewhat elaborately discussed by us in our Opening Brief on behalf of appellant Joseph B. Katz, filed in case No. 2812, now pending before this Court.

This question of law does not arise on the present appeal, as it is conceded that Harry Katz does not own the house and lot which was rented by Nellie White and used by her as a house of prostitution.

However, the warrant of arrest charges the appellee with having "been found connected with the management of a house of prostitution; and that he has been

found receiving, sharing in, or deriving benefit from the earnings of a prostitute, or prostitutes." (Transcript of Record, p. 12.) He was ordered deported on the same charges.

> Note: Respondent's Exhibit "A" is poorly numbered. The numbers seem to begin from the *last,* not the first, page.

There is absolutely not a scintilla of legitimate or competent evidence to uphold any such charges or any order of deportation based on such accusations.

The application for the warrant of arrest for Harry Katz (who is a chiropodist at Sacramento, California, and has not resided in Colfax for many years) is dated March 10, 1914. The warrant of arrest against Harry Katz is dated March 18, 1914. The secret or preliminary hearing before Examining Inspector D. J. Griffiths was held April 14, 1914, at Angel Island, California. The first regular hearing, by which we mean, a hearing at which the counsel of Harry Katz were permitted to be present, was held May 8, 1914. The second regular hearing of the charges made against Harry Katz was held on June 19, 1914, at Angel Island, California. The third and final hearing of the charges made against Harry Katz was held on September 2, 1914, at Angel Island, California. At this third and final hearing, the charges against his brother, Joseph Katz, were jointly heard, as the record discloses.

This preliminary explanation is made to avoid confusion to the Court and to opposing counsel in view

of the voluminous records attached to the petition for a writ of *habeas corpus.*

The attempted proofs endeavor to fix the place of the alleged commission of these two charges at Colfax, California.

It is most significant, in this connection, that Harry Katz has not lived in Colfax *since 1909 or 1910.* (See his statement at the secret or preliminary examination held April 14, 1914, Exhibit L, p. 12.)

The warrant of deportation against Harry Katz is based upon the same grounds as those contained in the warrant of arrest. (See Exhibit "VVV," p. 111.)

The petition for a writ of *habeas corpus* in behalf of Harry Katz and the arguments in support thereof were based upon three grounds:

First: ABSOLUTE INSUFFICIENCY OF ANY ALLEGED EVIDENCE, EITHER IN FACT OR IN LAW, TO SUPPORT THE WARRANT OF DEPORTATION.

Second: THAT THE AMENDATORY ACT OF MARCH 26, 1910, IS NOT RETROACTIVE, AND THAT ASSUMING, WHICH WE MOST STOUTLY DENY, THAT HARRY KATZ HAD ANYTHING WHATEVER TO DO WITH THE MANAGEMENT OF A HOUSE OF PROSTITUTION BEYOND BEING MERELY THE LANDLORD OF THE PREMISES, HIS ACTS IN THAT RESPECT ARE BARRED AND HE CANNOT BE DEPORTED IN THE YEAR 1915 FOR SOMETHING DONE BY HIM, AS SUCH LANDLORD OR IN ANY OTHER CAPACITY,

IN THE YEAR 1909, AND PREVIOUS TO THE ENACTMENT OF THE ACT OF CONGRESS OF MARCH 26, 1910.

Third: UNFAIRNESS OF HEARING IN MANY PARTICULARS.

The record is devoid of a single affidavit from any of the unfortunate inmates of the place rented by Joseph B. Katz, appellee's brother, to Nellie White. Not a single woman is produced, not a single affidavit is obtained and submitted in the record in which any of the inmates ever complained that either Joseph B. Katz or Harry Katz ever, at any time, or place, whether in Colfax or elsewhere, received, or shared in, or derived the slightest benefit from her earnings as a prostitute.

There is an entire absence of any direct evidence against either of the two brothers to sustain any of the charges preferred against them in the warrants of arrest.

In the absence of any direct evidence against either of these two brothers, an heroic effort was made by a number of the good women and men of Colfax to rid that place of the house of prostitution run by Nellie White and rented from Joseph B. Katz, by preferring charges against both the Katz brothers to the immigration officials, charges admittedly based upon information and belief and endeavoring to deport the Katz brothers upon information and belief, hearsay, opinions, conclusions, surmises and conjectures; in other words, producing anything and everything ex-

cept competent and legitimate evidence. An examination of the records before the immigration officials will bear out the truth of what we herein maintain.

Our contentions necessarily require an examination of the affidavits and other matters submitted to, and by, the Immigration Officials, in their recommendation and report to the Secretary of Labor, asking for warrants of deportation against the Katz brothers.

In order to assist the Court as well as opposing counsel, we prepared quite a comprehensive index of the numerous exhibits and other documentary matters appended to the petition for a writ of *habeas corpus* and minutely identified them for purposes of convenience, as Exhibits "A" to "BBB". (See Transcript of Record, p. 12.) These exhibits were transmitted in their original form to the Clerk's office of this Appellate Tribunal.

Counsel for appellant appended to their Return to the Petition for a writ of *habeas corpus* what purports to be a "record known as the 'Immigration Record in the Matter of Harry Katz on *habeas corpus,*' and numbered 53,770." (Respondent's Exhibit "A"; also called "Immigration Record.")

Insofar as this official record—respondent's Exhibit "A"—purports to contain full, true and correct documents, or copies thereof, of the numerous exhibits appended and attached to the petition for a writ of *habeas corpus,* numbered from "A" to "BBB", it is unobjectionable, but if it contain any secret reports, private official correspondence between the officials at Washington and at Angel Island or other

documentary matters never submitted or disclosed to the appellee or to his attorneys, it is, in that respect and to that extent, objectionable and a violation of that full and fair hearing which the law of the land and the rules of the Department of Labor are designed to enforce. Having this situation in view, and to fully protect the rights of appellee, the Traverse, filed by the appellee, to the Return to the writ of *habeas corpus,* specifically set forth as follows:

> "And, further answering said Return and what purports to be a full and complete transcript of all of the proceeding had before the Immigration Department in a record known as the 'Immigration Record, in the Matter of Harry Katz on *Habeas Corpus,*' and numbered 53,770, and appended to and made a part of said Return, your petitioner states that if it should appear that said record above referred to contains any further, additional, different or other alleged testimony or alleged evidence, documents, reports, private correspondence between the various officers of the Immigration Service, and any other papers, memoranda or data, other than those contained and set out in the various exhibits appended to the petition for a writ of *habeas corpus* then that said further additional, different or other alleged testimony or alleged evidence, documents, reports, private correspondence between the various officers of the Immigration Service, and any other papers, memoranda or data, were never disclosed or exhibited until up to the present time to said petitioner or to his attorneys or any of them, nor was said petitioner or any of his attorneys ever informed or apprised, either directly or indirectly, of the existence, nature or contents of any such further, additional, different or other alleged testimony or alleged evidence, documents, reports, private correspondence between the vari-

> ous officers of the Immigration Service, and any other papers, memoranda or data, other than those contained and set out in the various exhibits attached to the petition for a writ of *habeas corpus,* and said petitioner did not have, nor any of his attorneys, any opportunity to defend against such further, additional, different or other alleged testimony or alleged evidence, documents, reports, private correspondence between the various officers of the Immigration Service, or any other papers, memoranda or data, and to refute and to present proofs against the same, and, in this respect, your petitioner through his said attorney, avers that said hearing or pretended hearing or trial was unfair and in violation of law and of the constitutional rights and guaranties accorded to this petitioner, in consideration of which he is entitled to his discharge by the writ of *habeas corpus.*"
>
> (Transcript of Record, pp. 28-30.)

The record of the proceedings had before the Immigration Officials, *and appellant is bound by his own records,* discloses just what documents, affidavits and other papers were disclosed and shown to appellee and to his attorneys, upon which he was given an opportunity to present his defense thereto. These are as follows:

See proceedings before Examining Inspector Griffiths held on May 8, 1914 (Respondent's Exhibit "A", p. 106), which show:

> "ATTORNEY WOODWORTH: I desire, if that comports with your views, Mr. Inspector, to proceed with the case against Harry Katz. In that case we desire the record to show that we have been furnished with a copy of the application for

warrant for Harry Katz, alias Dr. H. H. Katz, and also with copies of the following affidavits: Affidavit of Mame L. Schoonover dated March 6, 1914, and taken at the City of Colfax, Cal.; also copy of affidavit of Jeannie Kendall Lobner; also copy of affidavit of Mary Hanson; also copy of affidavit of Lucy F. Peers; also copy of affidavit of Mrs. Minnie Gertrude Williams; also copy of affidavit of Emma McMullen; also copy of affidavit of Rosa A. Honn; also given copy of warrant of arrest against Harry Katz. We understand that these affidavits were used in support of application for warrant, the affidavits being dated March 6, 1914, and application for warrant dated March 10, 1914. As against these affidavits, which, as is the case with the affidavits presented against Joseph Katz, we make the same observation that they appear to be based *on information and belief of affiants*, and that they do not purport to state any facts within the personal knowledge of the affiants; that if the view we entertain of the character of these affidavits be that taken by the examining inspector; we are satisfied to proceed with counter affidavits, otherwise we respectfully ask for the production of these witnesses that they may be cross-examined, because we are satisfied they know nothing of their own personal knowledge—*only based on information and belief.*

"INSPECTOR GRIFFITHS: *That is all. Based upon information and belief.*

"ATTORNEY WOODWORTH: We now present the following affidavits on behalf of Dr. H. H. Katz; affidavit of Samuel Aaron, resident of the City of Stockton. All these affidavits are presented in duplicate and I ask that they be properly marked and identified. Affidavit of M. Briscoe, also a resident of Stockton; affidavit of Ray Friedberger, also a resident of Stockton, Cal.; affidavits of Dr. W. W. Stockwell, also a resident of Stockton, Cal.; affidavits of Dayton D. Davenport, also a resident of Stockton, Cal.; the affidavits of Valen-

tine Schroeder, a resident of the City of Sacramento, Cal.; affidavits of G. Steinman, resident of the City of Sacramento, Cal.; affidavit of Philip Asher, resident of the City of Sacramento, Cal.; affidavit of Frank S. Gray, also a resident of the City of Sacramento, Cal.; affidavit of M. Samuel, also a resident of the City of Sacramento, Cal.; affidavit of B. Gallagher, also a resident of the City of Sacramento, Cal.; affidavit of E. M. Brown, also a resident of City of Sacramento, Cal.; affidavit of H. F. Holmshaw, also a resident of the City of Sacramento, Cal.; affidavit of Cyrus Deckelman, also a resident of the City of Sacramento, Cal.; affidavit of Mark Harrison, also a resident of the City of Sacramento, Cal.; affidavit of John G. Pendergast, also a resident of the City of Sacramento, Cal.; affidavit of J. C. Furness, a resident of the City and County of San Francisco, Cal.; affidavit of Ted Lunstedt, also a resident of the City and County of San Francisco; affidavit of C. L. Scharff, also a resident of the City and County of San Francisco, Cal.; affidavit of Adolph Hess, resident of the City and County of San Francisco, Cal.; affidavit of A. M. Walthers, also a resident of the City and County of San Francisco, Cal. All of these affidavits go to the good character of Dr. H. H. Katz, and that there is no foundation for the accusation on which his deportation is sought, and a supplemental affidavit of Harry Katz, alias Dr. H. H. Katz, in which he denies *in toto* any matters alleged against him and on which it is sought to deport him. These are all the affidavits and evidence we have to present at this time unless there be some other evidence you have in your possession which we have not been apprised of.

"INSPECTOR GRIFFITHS: In relation to the case of Dr. H. H. Katz, we have to offer an affidavit which has been filed at this office signed by Frank Schillinger.

"ATTORNEY WOODWORTH: This is the first notice we have had of this affidavit and if it comports with your views, we would like to have a copy of it and an opportunity to meet it.

"INSPECTOR GRIFFITHS: (The attorney will be allowed to read the affidavit at this time and a copy will be furnished later.)

"ATTORNEY WOODWORTH: I have read the affidavit and inasmuch as it seems to import new matter into the case, I respectfully ask time in which to confer with my client and, if possible, meet the facts contained in this affidavit. I now ask whether you have any other evidence outside of this affidavit?

"INSPECTOR GRIFFITHS: We have received no other evidence up to date.

"ATTORNEY WOODWORTH: How much time will I be allowed to file briefs in the Joseph Katz case and also make further showing in Dr. Katz case?

"INSPECTOR GRIFFITHS: For the information of the attorney I desire to state that we expect to have more affidavits in both these cases against Joseph Katz and Dr. Katz, and that he will be given time until May 22d (two weeks). We will advise you on receipt of further evidence."

In the proceedings before Examining Inspector Griffiths on June 19, 1914 (Respondent's Exhibit "A", p. 37a, the following additional affidavits and papers were offered against the appellee:

"MR. WOODWORTH: Since the last hearing I have received from the Examining Inspector a number of affidavits, which affidavits are as follows: The affidavit of Frank Schillinger; the affidavit of Fergus Graham Irving; the affidavit of Charles W. Hanson; the affidavit of Harvey L. Wolfsen; the affidavit of Jeannie Kendall Lobner; the affidavit of Minnie G. Williams; the

affidavit of J. T. Taylor; the affidavit of William J. Carter; the affidavit of Charles H. Hill, a resident of New York; the affidavit of L. F. S. Peers, made May 29, 1914; the lady who seems to be the secretary of the Committee of Fifteen. I have also received what purports to be a certified copy of the record of proceedings had five years ago in a case pending in the Justices' Court in Colfax, and I have also received a copy of a brief by Attorney Cornish and also a copy of the report and recommendation of the Examining Inspector, Mr. Griffiths, to the Commissioner of Immigration. This, I believe, constitutes all the evidence that has been submitted to us since the last hearing. That is all the evidence you have, as I understand it, at the present time against Dr. H. H. Katz.

"INSPECTOR: Yes, sir."

In the proceedings before Examining Inspector Ainsworth, held on September 2, 1914 (Respondent's Exhibit "A", p. 141), the following additional affidavits and papers were offered against the appellee:

"EXAMINING INSPECTOR AINSWORTH: This is a continuation of the hearing in the case of Katz brothers, who have been arrested, Harry under warrant No. 53770/202 dated March 18, 1914, and Joseph, under Departmental warrant No. 53770/141 dated February 26, 1914. Mr. Woodworth appears for the purpose of meeting the additional showing which has been made in the case consisting of affidavits. Mr. Woodworth, will you please proceed?

"ATTORNEY WOODWORTH: Please understand that the showing we now make is made on behalf of both Dr. H. H. Katz and Joseph B. Katz. I make this observation so that it will obviate unnecessary repetition although the warrants were issued at different times and bear different numbers. I take it that the two cases are practically

combined in one for the purposes of this additional hearing. This additional hearing was ordered by the Department for the purpose of securing additional evidence against the Katz brothers but my understanding was and is that this additional investigation and evidence was directed chiefly to the production of evidence as to who purchased the furniture in the objectionable place. However, the evidence now offered as the additional evidence and the further showing made discloses that the examination has taken a much wider range. We desire to state that since the submission of the last hearings in addition to the affidavits and evidence furnished against the Katz brothers at that time, and which have been specifically enumerated in the hearings held on June 19, 1914, and on May 8, 1914, the following evidence constitutes the additional evidence presented against the Katz brothers, to-wit: Affidavit of Robert A. Peers, dated August 10, 1914; affidavit of Lucy F. Peers, his wife, dated July 31, 1914; affidavit of Jeannie K. Lobner, dated July 31, 1914; affidavit of Minnie G. Williams dated July 20, 1914, and another affidavit of Minnie G. Williams dated August 1, 1914, which also seems to be in the nature of a brief. A letter to the Honorable Secretary of Labor dated July 29, 1914, and purported to be signed by a number of citizens of Colfax demanding the deportation of the Katz brothers; a brief by Frank V. Cornish, City Attorney of Berkeley, California, dated August 18, 1914, and affidavit of Edward H. Honn dated August 1, 1914, and we have also been shown assessment list of 1914. There has been furnished to us a copy of a report by D. J. Griffiths, Immigrant Inspector, dated July 23, 1914, addressed to the Honorable Commissioner of Immigration purporting to contain a result of his investigations as to whether or not the objectionable place was furnished by either of the Katz brothers.

"INSPECTOR AINSWORTH: Allow me to interrupt you there, Mr. Woodworth. In your enumeration of additional evidence you refer to a letter from Frank V. Cornish and I want to ask you if you have a document that was attached to that letter.

"ATTORNEY WOODWORTH: Yes, sir. It is also in the nature of a brief."

Therefore, the record of the proceedings before the Immigration Officers disclosed just what affidavits, documents, letters and other papers were shown to the appellee and his attorneys, which they were given an opportunity to meet and refute.

Manifestly, if respondent's Exhibit "A," claimed to be the official record of the Immigration Officials, contain other affidavits, private reports, correspondence, which were used against the appellee in obtaining the warrant of deportation, but which was never shown or exhibited to him or his attorneys, this Court will take that fact into consideration and will not consider the same and will hold that the appellee did not get a fair and full hearing and that the order of deportation was arbitrary and unfair and subject to judicial inquiry. (Language of this Court in *Backus* v. *Owe Sam Gow*, 235 Fed. Rep. 847, *853-4*.)

We proceed with a consideration of the alleged evidence against the appellee.

The application for the warrant of arrest was made on March 10, 1914. (See Exhibit "B," p. 2.) This application refers to certain affidavits theretofore made on March 6, 1914, four days previous to the application, by nine of the good ladies of

Colfax. These nine affidavits are all substantially the same and seem to be carbon copies one of the other. (See Exhibits "C," "D," "E," "F," "G," "H," "I," "J," "K," pp. 3-11.)

They are all based, confessedly, on "information and belief." This fact was admitted and conceded by Examining Inspector Griffiths at the first regular hearing held at Angel Island, Cal., on May 8, 1914. (See Exhibit "M," pp. 18-19.)

Furthermore, these nine "information and belief" affidavits, aside from being valueless as competent and legitimate evidence against Harry Katz, were incompetent and inadmissible upon the hearings against Harry Katz, under the doctrine laid down in the case of *Hanges* v. *Whitfield,* 209 Fed. Rep. 675. This authority distinctly holds that, under the provisions of the Immigration Act of February 20, 1907, as amended by the Act of March 26, 1910, which authorize the arrest and deportation of aliens who have lawfully entered the United States for certain causes subsequently arising, *ex parte* affidavits and other documentary evidence may be taken *preliminary to, and as a basis for, an application* for a warrant for the arrest of an alien so charged, but such affidavits *can not be again used as evidence against him on his hearing after arrest,* at which he is entitled to be represented by counsel and to cross-examine the witnesses against him.

The opinion in that case will be found to be very instructive and it considers in detail the right of aliens

arrested to be deported for causes arising subsequent to their entry into the United States.

After calling attention to the Immigration rules of November 15, 1911, especially Rule 22 and the subdivisions thereof, which prescribe the procedure to be followed in deportation hearings, the learned Judge in that case says:

> "Testimony may, no doubt, be taken in the form of affidavits, *or otherwise,* preliminary to, and as a basis for, an application for warrants of arrest of specified aliens when the Immigration Officers are credibly informed, or have good reasons to believe, that such aliens are unlawfully within the United States. But is the testimony so taken upon the preliminary hearing, even when lawfully taken, admissible against the aliens upon the hearing required to be given them after warrants for their arrest have been issued, to determine whether or not they shall be deported? * * * It is incumbent upon the Government to establish by *competent evidence* that the petitioners or some of them had violated all or some of the provisions of the Immigration Act as so amended after they were admitted to the United States and prior to their arrest. True, the proceeding for this purpose may be summary, and before an executive, or other authorized, official of the Government; but it must be a *lawful proceeding,* the charge established by *competent evidence,* and the aliens afforded *a fair hearing* and *opportunity to discredit or disprove the evidence aduced against them.* Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, *with the right to cross-examine witnesses whose testimony is to be used against them before the Bureau of Immigration in determining whether or not they should be deported.*

"The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact; and it is indispensable in all judicial proceedings in this country, civil or criminal, that *ex parte* testimony, even though given under the solemnity of a legal oath or affirmation that it is true, taken in the absence of and without opportunity at some stage of the proceeding to the party whom it is proposed to be used to cross-examine the witnesses giving such testimony, *cannot rightly be used against him.* 1 Greenl. Ev. (16th Ed.), 447; 2 Wigmore on Ev., 1361, 1365.

"In this case, it appears without dispute that the petitioners were not informed at any time of their right to counsel until *after* the inspector had taken the *ex parte* affidavits and examined the petitioners at length, when at the close of such examination he asked each, 'if he desired counsel.' Upon each answering that he did, the inspector then fixed a time for the further hearing and postponed it accordingly. At such further hearing, counsel for the petitioners requested of the Inspector that the witnesses whose *ex parte* affidavits or statements had been previously taken be recalled that they might be cross-examined, which requests the Inspector denied. Some of the witnesses whose statements were taken by the Inspector were called by the petitioners but refused to testify unless the Inspector would so request, which request he refused to make. Others of the affiants the petitioners could not procure. *They were thus prevented from obtaining their testimony either upon direct or cross-examination. True, the petitioners and their counsel were permitted to examine the record, or copy of the testimony taken by the Inspector prior to the application for the warrant of arrest; but of what avail was that?* That testimony had already been forwarded to the Bureau of Immigration, and an

inspection of the record kept by the Inspector would only enable them to read what he had written, without opportunity to test its truthfulness by legitimate cross-examination or otherwise. *That such testimony is legally admissible in any proceeding in which it is sought to deprive any person, citizen or alien, of his personal or property rights, cannot be successfully maintained.*

"It is contended on behalf of the Inspector that he is authorized under Rule 22 of the Bureau of Immigration to arrest and examine the petitioners after the warrant for their arrest was issued, without informing them of their right to counsel, and to deny to them the right upon the hearing required to be given them until such time as he may see fit to thereafter permit them to have counsel. If that is the effect of the rule, *it is inconsistent with the usual and uniform procedure in all judicial proceedings under the laws of the United States where in it is sought to deprive persons lawfully therein of their personal and property rights, and but emphasizes the necessity of Immigration Officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported except upon legal evidence, which establishes with reasonable certainty, at least, the charges upon which it is sought to deport them.*"

This case was affirmed by the Circuit Court of Appeals. *Whitfield* v. *Hanges,* 222 Fed. 475.

See, also, the well-considered case of *Ex parte Lam Pui,* a decision by District Judge Connor, 217 Fed. Rep. 456.

Among other rules of law ably discussed by the learned Judge, applicable to deportation proceedings, are the following:

"Text-writers and judges have undertaken to

define the word 'evidence,' as applicable to judicial investigation, with more or less success. Probably no more satisfactory definition is found, for practical purposes, than that given by Mr. Edward Livingstone:

" 'Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied.' Draft, Code.

"It is elementary that in judicial proceedings the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. *It is also elementary that mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue.* The industry of counsel affords a number of illustrative expressions of courts. In *People* v. *Van Zile,* 143 N. Y. 372, 38 N. E. 381, Andrews, Chief Justice, says:

" 'Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.'

"Judge Caldwell, in *Boyd* v. *Glucklich,* 116 Fed. 131, 53 C. C. A. 451, well says:

" 'The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.'

"It may be that, upon a full, fair hearing, in which petitioner has the benefit of counsel, and all of his rights secured to him, the government will be able to establish the charge made against him. I am of the opinion that such a hearing has not been had, and that no evidence has been adduced upon which the finding that petitioner procured his certificate by false and fraudulent representations can be sustained. These are the only questions presented upon this record.

"The petitioner is entitled to be discharged from custody. An order to that effect will be drawn."

Therefore, it is clear that these nine "information and belief" affidavits sworn to on March 6, 1914, at least twelve days before the issuance of the warrant of arrest against Harry Katz, do not constitute any evidence whatever against Harry Katz, and their admission against him, as a basis for the warrant of deportation, deprived him of that full and fair hearing required by the law and regulations of the Department of Labor. These nine affidavits must be, therefore, eliminated from consideration. Outside of these "information and belief" affidavits, there is no competent or legitimate evidence to sustain the warrant of deportation, as was held by the learned Judge of the court below.

It is significant that counsel for appellant do not venture to make the slightest allusion to these "nine information and belief" affidavits to support the warrant of deportation.

We now proceed, briefly, to a consideration of each one of the other affidavits and documents introduced against Harry Katz.

The next affidavit is that of Frank Schillinger. (Exhibit "JJ," p. 42, attached to petition for writ of *habeas corpus;* p. 101, Immigration Record.) Counsel for the appellant insert this affidavit in their brief (pp. 17-18) without any comment.

A reading of this affidavit shows that it relates to something that took place in the year *1909,* or *one year before the enactment of the amendatory Act of Congress of March 26, 1910, under which it is now sought to deport appellee.* Furthermore, it relates to

an entirely different piece of property from that which his brother, Joseph Katz, now owns, or owned at the time of the issuance of the warrant of arrest against Joseph Katz. Again, this particular piece of property was sold by Harry Katz *several years ago. It is not the same property with reference to which the accusation is now made against Joseph Katz.*

That the penal provisions of the Act of March 26, 1910, amending the Act of February 20, 1907, do not operate retroactively would seem to be too clear for argument.

However, see

U. S. v. *Tsuji Suckichi,* 199 Fed. 750;
U. S. v. *Heth,* 3 Cranch. 399, 2 L. Ed. 479;
U. S. v. *Int. Mer. Co.,* 204 Fed. 702;
U. S. v. *North Ger. Llyd. S. S. Co.,* 185 Fed. 158;
U. S. v. *North Ger. Llyd. S. S. Co.,* 186 Fed. 672;
Hackfield v. *U. S.,* 197 U. S. 442;
Moffitt v. *U. S.,* 128 Fed. 375.

Therefore, whatever happened on the part of Harry Katz previous to March 26, 1910, assuming that anything happened at all which would subject him, in the slightest degree, to deportation, is effectually barred and cannot now be brought up against him after the *lapse of six years.*

Aside from that, a record of proceedings in the local court at Colfax, concerning the very piece of real property and its use referred to in the affidavit of Frank Schillinger, shows conclusively that that particular piece of property was not used for any im-

moral purpose *after July 22, 1909.* (See Exhibit "TT," pp. 53-54.)

Also, see, the affidavit of George W. Hamilton, formerly District Attorney of Placer County, which completely demolishes any suggestion or surmise that either Harry Katz or Joseph Katz was ever found receiving, sharing in, or deriving benefit from the earnings of any prostitute, or that Harry Katz was ever connected with the management of a house of prostitution. (See Exhibit "MMM," p. *93;* also Respondent's Exhibit "A," p. 174.) The affidavits of D. A. Russell and P. A. Crider, on behalf of H. H. Katz, support the testimony of Harry Katz. (Exhibits "AAA" and "BBB," pp. 71-72.)

The next affidavit is that of Fergus Graham Irving. (Exhibit "KK," p. *43,* attached to petition for writ of *habeas corpus,* p. 97, Immigration Record; also set out in Appellant's Brief, pp. 27-28, without any remarks.) This affidavit, tested by all the established rules of evidence, is totally insufficient to base any deportation against Harry Katz. The statement, in the affidavit, that "he knows Nellie White by sight and has seen her at various times in the town of Colfax in the house of prostitution on the County road in the northern part of Colfax, *which house is owned and controlled by Katz brothers,"* is, clearly, the expression of a mere conclusion of the affiant. It is to be observed that this affiant is talking about the house owned by Joseph Katz, not the one previously owned by Harry Katz in 1909 and now long since disposed of.

JOSEPH KATZ SWEARS THAT HE ALONE OWNS THE HOUSE RENTED TO NELLIE WHITE AT THE TIME THE WARRANT OF ARREST WAS ISSUED AGAINST HIM IN MARCH, 1914, AND HE IS CORROBORATED BY HIS BROTHER, HARRY KATZ, WHO SWEARS THAT HE HAS NO INTEREST IN SAID PIECE OF REAL PROPERTY. THERE IS NO EVIDENCE TO IMPEACH THE TESTIMONY OF THESE TWO MEN, SAVE THE CONCLUSIONS, SURMISES OR CONJECTURES OF PERSONS WHOSE RASH AND IRRESPONSIBLE STATEMENTS UNDER OATH CANNOT BE ACCEPTED FOR ANY PURPOSE WHATEVER.

Further, this particular affidavit of Fergus Graham Irving goes on to say:

> "That he has frequently seen Harry Katz during the last two years about said house of prostitution at different times of the day and that he SEEMED to be entertaining the female inmates of the house, and (SEEMED) to be superintending repairs and improvements about the house and grounds."

The statement that he "SEEMED" is, confessedly, a mere conclusion or guess of the affiant and does not constitute evidence.

He does not say that he ever saw Harry Katz get a cent from any prostitute, which is the charge made against him as well as the accusation that he was connected with the management of a house of prostitution.

Furthermore, this affidavit was taken on April 25,

1914, at Colfax, California, a place 150 miles distant from San Francisco and Angel Island, where the deportation proceedings were being held, and it was taken without the slightest notice to appellee Harry Katz or to his attorneys. They were effectually deprived of the right of cross-examination. They demanded the production of this and other affiants, as soon as they were apprised of the existence of these affidavits, for the purposes of cross-examination, but this important substantial right was denied the appellee, Harry Katz. (See Exhibit "WW," pp. 63-64; Exhibit "CCC," pp. 73-74.)

This method of procedure on the part of the immigration officials deprived appellant of a fair and impartial trial, as is held in the cases of *Hanges* v. *Whitfield,* 209 Fed. 675, and *Ex parte Lam Pui,* 217 Fed. 456. (See Record of Proceedings, Exhibits "WW" and "CCC," pp. 63-64, 73-74.)

It is true that, after Examining Inspector Griffiths at the hearings held on June 19,1914, as to both Katz brothers, had denied the request for the production of the affiants for the purposes of cross-examination, the Commission of Immigration saw fit, after the practical submission of the two cases, to address a letter to Marshall B. Woodworth, one of the attorneys for the Katz brothers, in the following vein:

> "Sir:
>
> "Referring to the case of Dr. H. H. Katz, arrested under Department Warrant No. 53770/202, dated March 18, 1914, and Joseph Katz, arrested under Department Warrant No. 53770/1414, dated February 26, 1914, charging that these

> aliens have been found receiving, sharing in, or deriving benefits from the earnings of a prostitute or prostitutes, and in whose cases you demand that the witnesses be presented for the purpose of cross-examination by you, you are advised that there is no provision in the Immigration Law providing for the subpoenaing of witnesses. The case for the government is submitted on affidavits aside from the direct testimony of the Katz brothers, and you as attorney for the defense have the privilege of submitting your case in a similar manner." (See Exhibits "SSS," p. 100.)

It is respectfully submitted that this letter of apology and explanation from the Commissioner of Immigration affords no defense or excuse to the failure of the Immigration Officer to give the appellee an opportunity to cross-examine these hostile witnesses. Whatever may be the condition of the law, which does not provide for the compulsory production of witnesses, still the Commissioner of Immigration, as a mere matter of *fairness* to the appellee, was in duty bound to notify him that the affidavits or the testimony of such and such witness was to be taken at Colfax or some other place at a certain and appointed time so that the appellee could have had a legal representative there to cross-examine these witnesses, who were certainly hostile and prejudiced against appellee and his brother, Joseph Katz, as the record discloses.

In *Ex parte Ung King Seng,* 213 Fed. 119, it is held that a Chinese alien was not accorded a fair hearing before the Immigration Officers, where her counsel was precluded by the Inspector from putting any

questions on cross-examination to witnesses produced and examined against her.

Substantially the same wrong is done to the Katz brothers by the Immigration Officers when they give no notice whatever that witnesses are to be examined against them, and thus preclude their attorney from being present to cross-examine. Especially is this true where it appears that the appellee, on June 19, 1914, was led to believe that his case had been submitted and that there was no occasion for any further testimony against him. (See p. 37a, Immigration Record.)

Thereafter, appellee was notified that additional affidavits had been secured against him and this necessitated a third and a final hearing on September 2, 1914, at which additional affidavits and several documents and reports were introduced against him and his brother, without the slightest notice to them or to their attorneys of the fact that such affidavits would be taken and without the slightest opportunity to be present and cross-examine the affiants.

At this final hearing on September 2, 1914, the attorney for the appellee again raised the point that the affidavits should not be admitted against the appellee and his brother because of the fact that they had been given no notice of the taking of the affidavits and no opportunity to cross-examine the affiants. This objection was overruled. What transpired may be best stated by quoting from the record of the proceedings at the final hearing, held on September 2, 1914, at Angel Island, as follows:

"ATTORNEY WOODWORTH: Yes, sir. It is also in the nature of a brief. Now at this time, and in accordance with previous requests made by us which were denied, and for the purpose of protecting the rights of the Katz brothers should *habeas corpus* proceedings become necessary, we ask for the production of those people for the purpose of cross-examination.

"INSPECTOR AINSWORTH: I will say in reply to that, Mr. Woodworth, that this office has no means by which any of the witnesses may be produced here for your cross-examination, but this office has no objection to your going to those witnesses and obtaining any statements from them that they see proper to give you.

"ATTORNEY WOODWORTH: As this is the final hearing of this matter, and we desire to have the cases closed and as we do not consider that the affidavits contain any evidence worthy of the name —in other words, that the affidavits are based largely on hearsay, statements on information and belief, matters of opinion, and guess work on the part of the affiants, and as to repair to Colfax to cross-examine those witnesses at this late day would take much time and necessitate an expenditure of considerable money, we state that the offer now made and permission granted to cross-examine these witnesses is not of any practical value and we will submit the case on the evidence offered here, such as it is, claiming that it is not sufficient to show, in the first place that Dr. H. H. Katz at any time was found connected with the management of a house of prostitution, or that he was found receiving, sharing in, or deriving benefit from the earnings of a single prostitute. We call the attention of the Honorable Examining Inspector and the Honorable Commissioner of Immigration to the fact that the matters with reference to Dr. H. H. Katz really relate to something that happened about five years ago, at any rate, previous to the amendment of 1910, amend-

ment to the Act of February 20, 1907. As to his brother, Joseph Katz, we admit that he owned the land and the house at the time the warrant of arrest was issued against him, but we contend that there is no evidence to show that he was found connected with the management of a house of prostitution or that he was found receiving, sharin, or deriving benefit from the earnings of a single prostitute. It is true that he received $25 a month, but that was simply for the rent of the place and his relation to the place was simply that of landlord and tenant. In support of these two defendants we present the following affidavits, which we ask to be appropriately marked. They consist of affidavits presented in duplicate, those affidavits to be used in both cases, of Geo. W. Hamilton, District Attorney for the County of Placer, in which Colfax is situated, in which he completely demolishes, in our judgment, any semblance of evidence that may have been presented against the Katz brothers." (Exhibit "CCC," p. *74*, attached to petition for writ of *habeas corpus;* p. 141, Immigration Record.)

The imperative necessity for some sort of a notice, to be given to the appellee, is obvious, especially if it be true that a compulsory production of the witnesses against an alien cannot be had by the Immigration Officers. Otherwise, what protection has an alien charged with deportation? The privilege of going perhaps a long ways to cross-examine a witness, and perhaps many days or months after he has given his direct examination, is no privilege at all and practically robs cross-examination of its principal virtue, viz.: that of an immediate examination of the adverse and hostile witness *at the time that he makes the adverse and inimical statements.* In the present case, one

of the witnesses, whose affidavit was produced against the petitioner Harry Katz at the hearing held on June 19, 1914, is one Charles H. Hill, *a resident of New York*. No notice whatever was given of the taking of this affidavit. And yet, under the permission given by the Commissioner of Immigration, both by letter above referred to and in his ruling at the hearing held on September 2, 1914, would counsel for the appellant have us believe that it would constitute a fair and full hearing to compel appellee Harry Katz and his attorney to go on a wild goose chase from California to New York to cross-examine Charles H. Hill, only to find, it may be, that he had left, or that he refused to be cross-examined? Would it not have comported more with an orderly and fair course of procedure to have notified the appellee that the deposition of Charles H. Hill, in New York, and the depositions of the other witnesses, at Colfax and elsewhere, would be taken at a certain time and place, so that appellee or his legal representative could be present to cross-examine, or to conduct the examination by interrogatories?

We cannot conceive how, under any aspect of the case presented to this Court, it can be claimed by the counsel for appellant that the appellee, or his brother, Joseph Katz, had a fair and full hearing in being denied the right of cross-examination of the various hostile and adverse witnesses produced against him, and without the slightest notice that their statement would be taken, a considerable portion of the statement being taken, without any notice to appellee

or his counsel, after it was announced that the cases had been closed and finally submitted for decision.

Hanges v. *Whitfield,* 209 Fed. 675;
Ex Parte Lam Pui, 217 Fed. 456;
Ex Parte Ung King Seng, 213 Fed. 119.

Passing to the next affidavit, that of Charles W. Hanson (Exhibit "LL," p. *44*; appended to petition for writ of *habeas corpus;* p. 96, Immigration Record), (see also Appellant's Brief, pp. 39-41), it will be found that it relates to matters taking place in the year 1909, a period prior to the time when the Amendatory Act of March 26, 1910, took effect. It purports to be a narration of some proceedings before Justice Kuenzley against Harry Katz, taking place in 1909. As the Act of March 26, 1910, is not retroactive, the affidavit of Charles W. Hanson, assuming, which we deny, that it establishes anything, relates to matters which are now barred and cannot be the subject of any deportation. There is nothing in his affidavit upon which any just or reasonable inference could be deduced that Harry Katz was connected with the management of the house of prostitution which Nellie White ran and the property of which, that is, the land, was owned by his brother Joseph Katz. It must be remembered that the property that Charles W. Hanson refers to, in 1909, is a different piece of property and not the same property now owned by Joseph Katz. There is nothing in this affidavit of Charles W. Hanson upon which to sustain any accusation that he was connected with the management of any house of prostitution or that he ever received

from any inmate of any house of prostitution any portion of her earnings in any way, shape or form. The mere fact that in 1909, he may have exercised acts of proprietorship in inspecting his real estate, supervising repairs and looking after the upkeep of his property, is not sufficient, in fact or law, to convict him of being connected with such a serious and odious charge as that of managing a house of prostitution or the more revolting accusation of receiving, sharing in, or deriving benefit from the earnings of a prostitute. It is a notorious fact, especially in the large city of San Francisco, that many alien and citizen property owners rent premises which are used for houses of ill-fame, and yet, up to this time, no immigration officer has ever attempted to arrest these alien property owners and attempted to deport them because of the rentals they receive simply in the capacity of landlords upon the theory that, in receiving their rents, they are in effect receiving, sharing in or deriving benefit from the earnings of prostitutes. Such an absurd attitude has as yet not been taken by the immigration officers. YET THAT IS PRACTICALLY THE POSITION THEY TAKE IN ISSUING WARRANTS OF DEPORTATION AGAINST THE KATZ BROTHERS UPON THE EVIDENCE PRESENTED, IF, INDEED, THE MATTERS PRESENTED CAN BE DIGNIFIED BY THE NAME OF EVIDENCE.

The same objections, as to deprivation of the right of cross-examination and no notice being given of the taking of the affidavit of Charles W. Hanson, and

the same arguments as to being thereby deprived of a fair and full hearing, may be urged as with other affidavits previously mentioned.

The next affidavit is that of Harvey L. Wolfsen (Exhibit "MM", p. 45, attached to petition for writ of *habeas corpus;* p. 94, Immigration Record), (see also Appellant's Brief, pp. 35-36). This affidavit is also totally insufficient to constitute competent or legitimate evidence to support any charge that Harry Katz was connected with the management of a house of prostitution or was found receiving, sharing in, or deriving any benefit from the earnings of a prostitute. He attempts to state: "That during the winter of 1912-1913, he has seen Dr. Harry H. Katz about the house APPARENTLY superintending the repairing. That he BELIEVES and is of the OPINION that the house referred to is owned by the Katz brothers, known as Joe and Harry." His belief and his opinion and what was "apparently" going on as to repairs certainly do not constitute competent or legitimate evidence. Furthermore, even if the house were owned by Harry and Joe Katz, how, in the name of common sense, would that fact justify the inference that either of them was connected with the management of a house of prostitution or that either of them was ever found receiving, sharing in, or deriving benefit from the earnings of a prostitute. Not a single one of the prostitutes was called upon to testify, in spite of the vigilance of the immigration inspector who went to the extreme, after investigating the situation at Colfax, to telegraph to Wash-

ington, D. C., for a telegraphic warrant of arrest for Joseph Katz, ignoring for the time being Harry Katz. Not a single man or woman testifies directly or indirectly that Harry Katz was connected with the management of any house of prostitution. In fact, after 1909, Harry Katz had nothing whatever to do as landlord of any premises in Colfax rented for immoral purposes. There is not a single shred of evidence that Harry Katz ever received or shared in or derived any benefit from the earnings of any prostitute.

The same objections, as to deprivation of the right of cross-examination and no notice being given of the taking of the affidavit of Harvey L. Wolfsen, and the same arguments as to being thereby deprived of a fair and full hearing, may be urged as with other affidavits previously mentioned.

The next affidavit, that of Robert F. Pottol (Exhibit "MMa", p. 45½, attached to petition for writ of *habeas corpus;* p. 79, Immigration Record), (see appellant's opening brief, pp. 32-33), establishes nothing and relates simply as to the character of the house run by Nellie White. There is no dispute about the fact that Nellie White ran a place of ill-fame. There is no dispute about the fact that she rented the place from Joseph Katz, who was her landlord. There is no evidence that Harry Katz was landlord or had the slightest interest in the place except possibly as a brother of Joseph Katz. Joseph Katz swears that he was the sole owner of the land and house. No one contradicts him. Harry Katz swears that he had no interest in the land and house rented by his brother

Joseph Katz to Nellie White. No one contradicts him. As was well said in *Ex parte Lam Pui,* 217 Fed. 456-*467*: "It is also elementary that mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue."

There is no evidence at all against Harry Katz except suspicion, conjecture, speculation, information and belief, opinion, etc.

As to the next affidavit, that of Jeannie K. Lobner (Exhibit "NN", p. 46, attached to petition for writ of *habeas corpus;* p. 81, Immigration Record), (see appellant's opening brief, pp. 34-35), which is similar in its purport with that of Robert F. Pottol, just referred to (Exhibit "MMa", p. 45½), the same may be said as of that of Robert F. Pottol.

Also the same arguments as to deprivation of right to cross-examine and the fact that no notice whatever was given of the taking of the affidavit are advanced as to the Robert F. Pottol and Jeannie K. Lobner affidavits, just referred to.

The next affidavit is that of Minnie G. Williams (Exhibit "OO," p. 47, attached to petition for writ of *habeas corpus;* p. 94x of Immigration Record), (see appellants' Opening Brief, pp. 36-39.) This lady also gave an affidavit in support of the application for the warrant of arrest which has been previously referred to as one of the nine "information and belief" affidavits sworn to before the warrant of arrest was issued. (See Exhibit "L", attached to petition for writ of *habeas corpus.*)

This second affidavit of Minnie G. Williams is also sadly lacking in merit as evidence. She states that: "It is the *firm belief* of the *affiant* that the aforesaid house, occupied by Nellie White, was the headquarters of Harry H. Katz whenever he was in Colfax." But such "firm belief" is not evidence. Even if it were, that fact does not establish that Harry Katz was connected with the management of a house of prostitution or that he ever received, shared in, or derived any benefit whatever from the slightest earnings of a prostitute.

Her statements, in this affidavit, that lumber bills were made out at times in the name of Harry Katz does not establish that Harry Katz is connected with the management of a house of prostitution or that he received or shared in or derived benefit from the earnings of a prostitute. Such fact does not establish anything derogatory to either Harry Katz or Joseph Katz. The statement: "The affiant has been in a position to observe many times Joe Katz and Harry Katz in conference with each other, discussing legal looking documents," is so absurd that it deserves but to be mentioned to be condemned. The further statement that: "The Katz brothers were, to all appearances, a close corporation in their business affairs," is nothing more than the mere absurd conclusion of the affiant. Even if they were a "close corporation in their business affairs," how does such absurd statement sustain the serious charge that Harry Katz was connected with the management of a house of prostitution or that he ever in one single instance received,

shared in, or derived benefit from any earnings of a prostitute. Not a single man or woman testifies *directly* in support of such charges. It is significant that no policeman, or constable, or other law officers in Colfax testify to such charges or to such a state of facts from which the deduction or inference might legitimately and fairly be drawn that Harry Katz was connected with the management of the place run by Nellie White or ever received any of the earnings of any prostitute. Not a single one of the inmates was called to testify to such state of facts.

The same objection is urged, as to this affiant, as to the unfairness of the hearing in not being permitted to cross-examine affiant and in not being notified of the taking of her second affidavit.

The next affidavit is that of J. T. Taylor (Exhibit "PP", p. 48, attached to petition for writ of *habeas corpus;* see p. 80, Immigration Record; see appellant's opening brief, pp. 33-34). His affidavit is also totally insufficient. He testifies to the erection of the house owned by Joseph Katz some five years ago and testifies: "That during the erection of said house he frequently saw Harry H. Katz superintending and directing about the place and acting in a manner indicating *proprietorship.*" This is nothing more than a statement of a mere conclusion. Even assuming it to be true, the fact that Harry Katz superintended and directed the erection of his brother's house is no evidence, in fact or law, that he was connected with the management of a house of prostitution or ever received any earnings of a prostitute.

The same objection is urged, as to this affiant, as to the unfairness of the hearing in not being permitted to cross-examine affiant and in not being notified of the taking of the affidavit.

The next affidavit is that of William J. Carter (Exhibit "QQ", p. 49, attached to petition for writ of *habeas corpus;* p. 95, Immigration Record). This affidavit is subject to the same infirmity as all the others. It does not purport to state facts, but mere opinion or belief. He says: "That it was reputed to be the property of Katz brothers." This is a mere conclusion of affiant and certainly hearsay.

The same objection is urged, as to this affiant, as to the unfairness of the hearing in not being permitted to cross-examine affiant and in not being notified of the taking of the affidavit.

The next affidavit is that of Charles H. Hill (Exhibit "RR", p. 50, attached to petition for writ of *habeas corpus;* pp. 77-78, Immigration Record; see appellant's opening brief, pp. 10-12). This gentleman was a resident of New York at the time of giving his affidavit. There was certainly no opportunity to cross-examine him except by going to New York. No notice whatever of the taking of his affidavit was given the appellee and he knew nothing about it until it was actually used against him. The affiant alludes to things that happened in 1909. As we have stated, the Act of March 26, 1910, is not retroactive, assuming that Harry Katz did anything in 1909, which we deny, which would subject him to deportation. He states: "That *to the best of his knowl-*

edge and belief the said Harry Katz conducted the said house, known generally to the people of Colfax as a house of prostitution." It is respectfully submitted that the mere belief of the affiant Hill is not legitimate evidence, but, aside from that, he admits that he has not lived in Colfax since April, 1910, and his statements are with reference to matters which transpired in 1909, previous to the passage of the Act of March 26, 1910.

We have already alluded to the inability to cross-examine the affiant Hill and to the fact that no notice whatever was given as to the taking of his affidavit, whereby we might have prepared, forwarded and plied him with cross-interrogatories.

The next document, purporting to be a sworn affidavit, is that of Lucy F. S. Peers (Exhibit "SS", p. 51, attached to petition for writ of *habeas corpus;* pp. 75, 76, Immigration Record; see appellant's opening brief, pp. 2-5.) This is a most curious document, introduced against Harry Katz and Joseph Katz, under the guise of a sworn affidavit. It purports to be signed and sworn to by "L. F. S. Peers, Secretary of the Committee of Fifteen." It violates all the rules of evidence and purports to be in the nature of a report, by the Secretary of the Committee of Fifteen, of efforts to stamp out houses of prostitution in Colfax. It contains nothing more than matters of hearsay, information and belief, and other rash and irresponsible statements unworthy of the name of evidence. A mere reading of this so-called affidavit will convince this Court of its worthlessness. This alleged affidavit

is really "hearsay of hearsay". It concludes: "The above facts were collected by the Committee of Fifteen—composed of women who have undertaken to rid their community of the houses of prostitution—and it has authorized its Secretary to sign the same before a Notary Public." Therefore, the Committee of Fifteen first collected facts, so called, and then told these facts to its Secretary and its Secretary collated these facts in her sworn affidavit, one of the affidavits upon which it is sought to deport both Harry Katz and Joseph Katz.

One of the statements made by Mrs. L. F. Peers is:

> "The immigration service was notified and Mr. Griffiths came to Colfax to investigate the matter. *The inmates of the redlight district were brought into court and examined by Mr. Griffiths.*" (Exhibit "SS", p. 51.)

Although the inmates were examined by Immigration Inspector Griffiths in court, not a single one ventures to say that Harry Katz had anything to do with the management of the place run by Nellie White or that Harry Katz or his brother Joseph Katz ever received, or shared in, or derived any benefit whatsoever from the earnings of any of the inmates.

We make the further objection as to deprivation of right to cross-examine Mrs. L. F. S. Peers and the fact that no notice was given of the taking of this so-called affidavit, and the unfairness of the hearing in that respect.

The next document used against appellee, Harry

Katz, is what purports to be a certified copy or abstract of the proceedings in the case of the People of the State of California against Harry H. Katz (Exhibit "TT", p. 53, attached to petition for writ of *habeas corpus;* pp. 98-99, Immigration Record; see appellant's opening brief, pp. 13-17).

This record relates to occurrences up to July 22, 1909, a considerable period prior to the passage of the Amendatory Act of March 26, 1910. As already stated, the Act of March 26, 1910, is not retroactive. Furthermore, the abstract shows that:

> "District Attorney Tuttle made a statement, that an understanding was had with the defendant and his attorney, that the house referred to in the complaint should not be used or let hereafter for immoral purposes, and with that purpose in view, and the consent and acquiescence of the complainant herein, he made a motion to dismiss this case; and in consideration of all the circumstances in the case, and the improbability of conviction of the defendant in the event of proceeding with the case to its close, on account of the bias of the jurors, the court dismissed the case, and discharged the jury, witnesses, and defendant." (Exhibit "TT", p. 54.)

It must be remembered that the house involved in the criminal proceedings in 1909 was disposed of by Harry Katz subsequent to July 22, 1909, and that it is not the same house owned by his brother Joseph Katz at the time of the arrest of Joseph Katz by the immigration authorities. The house owned by Harry Katz, on July 22, 1909, was in an entirely different part of town from that afterwards acquired and owned

exclusively by his brother, Joseph Katz. (See affidavits of H. H. Katz and Joseph B. Katz. Respondent's Exhibit "A", pp. 129, 128, 127, 126, 125.)

Furthermore the abstract of proceedings indicates that after July 22, 1909, the house owned by Harry Katz at that time was not used or let thereafter for immoral purposes. How this certified copy of abstract of proceedings is any evidence to support the charge against Harry Katz, that he was connected with the management of a house of prostitution, other merely than as landlord, or that he ever received, shared in, or derived any benefit from the earnings of any prostitute, in the sense undoubtedly intended by the Amendatory Act of March 26, 1910, that is, that he received, or shared in, or derived benefit from the earnings of a prostitute in the character of a maquereau, is incomprehensible to us.

The next interesting document introduced and used against the appellee, Harry Katz, as well as against his brother, Joseph Katz, is what is entitled: "Statement of Counsel for Committee of Fifteen with Comments on Testimony Offered (Exhibit "TT", pp. 85-86-87-89, attached to petition for writ of *habeas corpus;* p. 74, Immigration Record.)

The statement is an argument presented by Frank V. Cornish, as attorney for Committee of Fifteen. What place it has in the hearings on the deportation proceedings against either Harry Katz or Joseph Katz we do not understand. It is not sworn to and contains many statements not established by witnesses under oath or with the benefit of cross-examination.

We charge that the use of such a document deprived both Harry Katz and Joseph Katz of a full and fair hearing, for the reason that the admission of such a document was clearly incompetent, irrelevant and immaterial, and did not constitute competent, or any, evidence. Furthermore, it deprived Harry Katz and Joseph Katz of full and fair hearings for the reason that nowhere in the immigration laws or in the rules established "not inconsistent with law" is there any provision for the appearance of special and private counsel to prosecute aliens charged with deportation offenses. Furthermore, the admission of such a "Statement of Counsel for Committee of Fifteen with Comments on Testimony Offered", containing, as it does, a vicious and unprovoked attack upon the appellee, must have influenced the Commissioner of Immigration and the Secretary of Labor in their recommendation and determination, respectively, to issue warrants of deportation against the appellee, and the partisanship and bias and prejudice of the good ladies of Colfax composing the Committee of Fifteen and of their learned and able attorney could not but fail to create an impression, in the minds of Examining Inspector Griffiths and Examining Inspector Ainsworth and Commissioner of Immigration Backus and of the various officials connected with the Department of Labor in Washington, in issuing the warrants of deportation, unfavorable to the appellee. Such documents, and such tactics, permitted by the immigration officials, to be used against the appellee, undoubtedly prevented him from having that full, fair

and impartial hearing which the laws of this country guarantee to the meanest and humblest person. We think that further argument, as to the inadmissibility of the document referred to and the deep prejudice it must have created against the appellee, thereby depriving him of a fair and impartial hearing, is unnecessary and superfluous.

The next document used against both Harry and Joseph Katz is a report made by Examining Inspector Griffiths to his superior, the Commissioner of Immigration, on June 12, 1914. (Exhibit "VV", p. 59, attached to petition for writ of *habeas corpus;* p. 111, Immigration Record; see appellant's opening brief, pp. 43-45.)

This report is not sworn to and is made by Examining Inspector Griffiths in his official capacity. It refers to matters not sworn to by a single witness, and refers to other matters clearly incompetent, irrelevant and immaterial. The use of any such official report against appellee, *as evidence against him,* was certainly unfair and deprived him of a full and fair hearing.

As already stated, if the report of Examining Inspector Griffiths be regarded simply in the nature of a recommendation to his superior, the Commissioner of Immigration, no objection could be made to it on that ground. But an examination of that report shows its unfairness to these Katz brothers in that it purports to report matters *as proved facts against them,* when the record shows that not a single witness swears to any such facts. Further, the absurdity of the situ-

ation is realized and the unfairness of the whole proceeding appreciated when the record shows that Inspector Griffiths is the original investigator of the charges against the appellee; that he is the arresting officer; that he is the inquisitor, that is, the examining inspector who has charge of the secret examinations and hearings; that he is the judge who makes his recommendation to his chief, the Commissioner of Immigration. Such being the fact, how, in the name of justice, his report, containing statements of fact against the Katz brothers, which he claims to have gathered from his investigations of a secret and private nature, can be dignified by the name of evidence, is inexplicable to us. Such a proceeding is intolerable and a prostitution of justice itself. Its unfairness is obvious.

As was well said by District Judge Holt, in the frequently cited case of *United States etc.* v. *Williams,* 185 Fed. 598, 599, after referring to the usual procedure in deportation proceedings:

> *"It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. * * * The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge.* The secretary who issues the order of arrest and the order of deporation is an administrative officer, who sits hundreds of miles away, and never hears or sees the person proceeded against or the witnesses. Aliens, if arrested, are at least entitled to the rights which such a system accords them; and, if they are deprived

of any such right, the proceeding is clearly IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED IN IT INVALID."

Such a report of the examining inspector, purporting to state *as facts* matters he claimed to have discovered in his investigations, not even being sworn to and the inspector not offering himself as a witness so that he might be cross-examined, was eminently improper and deprived the appellee of that full and fair hearing guaranteed to every one by the laws of this country. As was well said, in *Ex parte Lam Fuk Tak,* 217 Fed. 468, *459*, of a somewhat similar situation to that developed in the case at bar:

> "At this point the inspector puts in a record: 'On the occasion of the visit to that laundry by the inspector in charge, on or about December 20, 1913, this Chinaman was found engaged in laundry work there—126 Market Street.' * * *
>
> "Except for the statement inserted in the record, *not under oath,* and doubtless without the knowledge of the petitioner, by the inspector, there is not a scintilla of evidence tending to establish the charge that petitioner obtained his certificate of admission by false or fraudulent representation. *It is manifestly improper for an inspector, who has a person in his custody charged with the duty of giving him an opportunity to show cause why he should not be deported, to insert in the examination his own unverified statement regarding the very matter in controversy. If he wishes to become a witness against the alien, he should offer himself in the regular way. The petitioner and his counsel should have an opportunity to confront and cross-examine him.*
>
> "THE STATEMENT OF THE INSPECTOR MUST BE STRICKEN OUT AND

> DISREGARDED. THE FACT THAT IT IS INSERTED IN THE RECORD TENDS STRONGLY TO SHOW THAT PETITIONER WAS NOT GIVEN A FAIR HEARING. ELIMINATING THIS STATEMENT, THERE IS NO EVIDENCE UPON WHICH THE ORDER FOR DEPORTATION CAN BE SUSTAINED. LET THE PETITIONER BE DISCHARGED."

And, in *Ex parte Plastino,* 236 Fed. Rep. 295, *297*, it was said:

> "The statement of the inspector in this record, unsupported by oath, is not testimony. Even though it had been given under oath, it is not testimony which would be admitted in any court, as it is the inspector's conclusion, etc."

The next affidavit is that of Robert A. Peers, husband of Lucy F. S. Peers, the Secretary of the Committee of Fifteen. (Exhibit "DDD," p. *76*, attached to petition for writ of *habeas corpus,* p. 155, Immigration Record. See Appellant's Opening Brief, pp. 30-32.)

That affidavit refers principally to Harry Katz. It relates to matters occurring in 1909—five years prior to the arrest of appellee. The affidavit is worthless as competent or any evidence of any facts to support the deportation of either of the Katz brothers. The affidavit abounds in hearsay statements, conclusions, information and belief, and other rash and irresponsible statements, unworthy of the name of evidence. He says:

> "The affiant also avers that since that time (1909) the two brothers, Harry Katz and Joseph

> Katz, have conducted a house of prostitution on the property described as lot 1 block 2, additional survey of the town of Colfax and it is a well known fact in Colfax that the Katz brothers were interested in the management of this house of prostitution over which Nellie White, a notorious prostitute, presided as madam."

This statement simply represents the conclusions of the affiant that "they have conducted" and "it is a well known fact." The further statement: "The affiant avers that he has never heard these things denied until the arrest of Harry and Joseph Katz in 1914," is not testimony of any fact. The mere fact that he never heard anything denied is no evidence of anything, especially when cross-examination is denied to the appellee and no notice given of the taking of this affidavit. The affidavit further states that "he has frequently heard" and "it was generally understood by the people of Colfax."

Such rash and improper statements do not constitute competent or legitimate evidence upon which to base an order of banishment, especially when cross-examination is denied and no notice given of the taking of the affidavit.

The next affidavit is that of Lucy F. S. Peers (wife of the previous affiant) and the Secretary of the Committee of Fifteen, formed to rid Colfax of houses of prostitution. (Exhibit "EEE," p. 77, attached to petition for writ of *habeas corpus,* p. 154, Immigration Record. See Appellant's Opening Brief, pp. 29-30.)

This Honorable Court will observe that this is *only*

the third affidavit made by the energetic Mrs. Peers to deport the Katz brothers. She made the first affidavit on February 24, 1914, being one of the nine "information and belief" affidavits in support of the application for a warrant of arrest. (Exhibit "J," p. 10.) She made the second affidavit on May 29, 1914 (Exhibit "SS," p. 51), that being the curious document consisting of argument, reports of facts collected by other persons, hearsay, conclusions, etc. The present affidavit is the third. (Exhibit "EEE," p. 77.) In this affidavit, she endeavors to state an interview that occurred between herself and another affidavit-maker, Jeannie K. Lobner (see Exhibit "K," p. 11), and the local District Attorney, George W. Hamilton. Of course, at this interview neither Harry Katz nor Joseph Katz was present, and yet the Immigration authorities courageously and remorselessly violated all the rules of evidence in permitting an affidavit to be used against the Katz brothers wherein Lucy F. S. Peers states a conversation that she had with George W. Hamilton, the District Attorney of Placer County.

Not only are neither Harry Katz nor Joseph Katz bound by what she said or her affidavit-making friend, Jeannie K. Lobner, said, to George W. Hamilton, but such statements are the rankest kind of hearsay testimony and inadmissible in any court of justice.

Aside from that, it is but proper to state that George W. Hamilton, the former District Attorney of Placer County, directly contradicts the third affidavit of Lucy F. S. Peers and third of Jeannie K. Lobner, in an affidavit presented by him in behalf of the Katz

brothers dated August 29, 1914. (Exhibit "MMM," p. 93, attached to petition for writ of *habeas corpus,* Immigration Record.)

This affidavit of George W. Hamilton, in our judgment, so completely demolishes the absurd prosecution, attempted to be built up against the Katz brothers by the Committee of Fifteen, assisted by the over-zealous Immigration Officials and their special counsel, Attorney Frank V. Cornish, that we quote and set the same out in full:

"In re 12020/659. } H. H. Katz, and
"Katz Cases. } Joseph Katz.

"STATE OF CALIFORNIA, }
} ss.
"COUNTY OF PLACER. }

"GEO. W. HAMILTON, being first duly sworn, deposes and says: I am a resident of the City of Auburn, of the above county and state; an attorney at law therein, and have lived therein for over forty years, and practiced my profession therein for the past twenty-five years, and am now residing and practicing law at that place; that my attention and notice has just been called to two certain affidavits made by Lucy F. Peers and Jeannie K. Lobner, dated, respectively, July 31st, 1914, and that I had not, previously, any notice or knowledge thereof, and that as to the statements therein contained, and the facts in relation thereto, deponent, respectfully shows, alleges and represents as follows, to-wit:

"That in the month of August, 1913, I was the duly acting and qualified district attorney of said county and state, and that about that time I was visited, and besought by the ladies in question, to take some official action toward and directed at

the abatement and discontinuance of two houses of prostitution located in the City of Colfax, in said County and State.

"That the said ladies stated and represented themselves to be members of a local committee known as and designated as the 'Committee of Fifteen,' with the intention of, and the purpose, for its organization and existence, of abolishing the above places.

"That both of the above named persons, in that interview showed themselves to be entirely ignorant of the provisions and requirements of the law, and in addition, advised and informed affiant that they intended to have the redress above, regardless of either the inclination or the disposition of the district attorney, if he were not inclined to pursue the course and procedure which they had devised to be followed therein.

"That affiant did in that, and other conversations, with the said ladies named, and other of the committee, use every honorable and reasonable argument and persuasion against their following out their alleged purposes, and explained that they could not, and would not be of assistance therein.

"That affiant gave them all the information which he had, and assured them that he was convinced of the character of the houses, but that he did not then, or at any other time, use the names of any persons, other than the persons actually conducting the said houses, to-wit, Nellie White and Roma Burdell.

"That affiant had not then, and had never had any information, notice or advice that either H. H. Katz or Joseph Katz, were either the owners, or had otherwise to do with either of the said houses.

"That as such district attorney, and in pursuit of my official duties, I had investigated said places, and while convinced of the character, I had never been advised that either of the houses

were either directly or indirectly, or in the remotest degree or manner, sustained or maintained by either of the Katz brothers.

"That the agitations of the Committee of Fifteen, of which Lucy F. Peers was the secretary, and Jeannie K. Lobner, the president, finally led to the formal presentation of the subject to the city trustees of the City of Colfax, the board of supervisors of the county, and the grand jury, and that each of these bodies publicly and formally acted thereon, and refused to take any action in the premises, and that it was not then, or at any of the public presentations of the subject, pretended or represented that the houses in question were contributed to, in any way, except by the above named persons, Nellie White and Roma Burdell, and at no time, except when this alleged charge against the above named Katz brothers was prepared, framed and presented to the federal authority, was there any pretense thereof.

"That with the utmost respect to the names and social standing of the ladies who have made and presented the above affidavits, that their actions and conduct has been repudiated and condemned by every public body in Placer County, and that the same is disclosed by the public record thereof.

"That it has been their open and avowed boast that they would ruin those who did not share their views, or oppose their efforts, and that invariably, and without exception, every local body and commission, and persons conversant and advised of the situation, and of the motives of its advocates, has repudiated and condemned the movement and the methods of the committee.

"GEO. W. HAMILTON.

"Subscribed and sworn to before me this 29th day of Aug. 1914.

"(SEAL) "MARY H. WALLACE, Notary Public."

This affidavit explains, much better than we can, the entire situation at Colfax and the reason for the

hatred and deep-rooted prejudice of the good ladies of Colfax against the Katz brothers.

It is significant that the U. S. Attorney does not set out this affidavit, so favorable to the Katz brothers, in his Opening Brief.

The next affidavit, the *third* affidavit of Minnie G. Williams (Exhibit "GGG", p. 79, attached to petition for writ of *habeas corpus,* pp. 148-148x, Immigration Record—see Appellant's Opening Brief, pp. 18-23) is the most remarkable of all of the affidavits or documents and reports presented against the Katz brothers and upon which warrants of deportation were seriously asked for. A reading of this remarkable affidavit, sworn to on July 29, 1914, will disclose to this Honorable Court to what lengths persons will go who, although their intentions are well meant and to be commended, are ignorant of the rules of evidence and of the laws of the land, and who are willing, in their zeal and partisanship, to prostitute justice itself to accomplish their aim.

This remarkable affidavit of Minnie G. Williams contains a mass of rash and irresponsible statements, many of which are clearly hearsay, others based on information and belief, conclusions, opinions, and anything and everything except legitimate and competent evidence. In fact, the affidavit seems to be rather an argument in which the affiant does not hesitate to heap tirades of abuse on the Katz brothers. Minnie G. Williams has much to learn about the rules of law. She makes the astounding and revolting statement in her affidavit of July 29, 1914, that: "INFORMA-

TION AND BELIEF IS *ALL* THAT IS REQUIRED BY LAW."

Every other affiant, who seeks to deport the Katz brothers, seems likewise imbued with the idea that "information and belief is all that is required by law" to banish the Katz brothers. This view of the law seems to have been shared by the immigration officials themselves, for they accepted these absurd and outrageous affidavits and acted upon them when ordering the deportation of the Katz brothers.

Not only does Minnie G. Williams, in this *third* affidavit, heap abuse upon the Katz brothers and indulge in such rash and irresponsible statements that the affidavit, so called, is not worthy of consideration at all as evidence against the Katz brothers, but she goes to the extent of upbraiding the inoffensive attorneys who happen to represent the Katz brothers and she says: "We pray that unscrupulous lawyers may not be permitted to juggle with the laws of the State and Nation—we pray that justice may be allowed to prevail." (Exhibit "GGG", p. 81.) Such irresponsible and ill-advised statements are the most convincing evidence of the unfairness of the hearings accorded to the Katz brothers and of the fact that they were ordered deported, not on evidence, but on suspicion, conjectures, surmises, abuse, passion and prejudice. We cannot refrain from again quoting from the opinion of Judge Reed in *Hanges* v. *Whitfield, supra,* that the examination

> "must be a lawful proceeding, the charge established by competent evidence, and the aliens

> afforded a fair hearing and opportunity to discredit or disprove the evidence adduced against them. Such an opportunity requires that they have the benefit of counsel at every stage of the proceedings after their arrest, with the right to cross-examine witnesses whose testimony is to be used against them. * * * The right of cross-examination is one of the principal, as it is one of the surest, tests which the law affords for the ascertainment of the truth in all disputed matters of fact. * * * It is contended in behalf of the inspector that he is authorized under rule 22 of the Bureau of Immigration to arrest and examine the petitioners after the warrant for their arrest was issued, without informing them of their right to counsel, and to deny to them the right upon the hearing required to be given them until such time as he may see fit to thereafter permit them to have counsel. If that is the effect of the rule, it is inconsistent with the usual and uniform procedure in all judicial proceedings under the laws of the United States wherein it is sought to deprive persons lawfully therein of their personal and property rights, and but emphasizes the necessity of immigration officials following strictly the law providing for the deportation of aliens, to the end that they shall not be deported, *except upon legal evidence, which establishes, with reasonable certainty, at least, the charges upon which it is sought to deport them.*"

District Judge Connor, in *Ex parte Lam Pui,* 217 Fed. 456, *465,* after quoting from Judge Reed in *Hanges* v. *Whitfield* as above set forth, says:

> "Long, and frequently sad, experience teaches that when officers entrusted with the administration of laws affecting the liberty of men are permitted to set aside and disregard those safeguards which the wisdom of the ages have set up for the protection of liberty, in respect to those of one

> race or color, one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved. If necessity, or the public safety, demands that swift, unusual, and summary methods of procedure be permitted, the power should be conferred by the people's representative in Congress in clear and unmistakable terms, and not by rules of departments conferring such power upon inspectors."

The next affidavit is that of Jeannie K. Lobner, also her *third* affidavit to secure the deportation of the Katz brothers (Exhibit "FFF", p. 78, attached to petition for writ of *habeas corpus,* 152 Immigration Record).

This affidavit is identical in language with that sworn to by Lucy F. Peers, also her *third* affidavit, to obtain the deportation of the Katz brothers (Exhibit "EEE", p. 77). In fact, they are probably carbon copies of one and the same affidavit. Jeannie K. Lobner, like Lucy F. Peers, pretends to state an interview that occurred between herself and the other affidavit maker, Lucy L. Peers, and the local District Attorney, George W. Hamilton Obviously, such affidavit is the grossest kind of hearsay and not binding on either of the Katz brothers, neither one of them being present.

The next affidavit is still another affidavit, the *fourth,* by Minnie G. Williams (Exhibit "HHH", p. 82, attached to petition for writ of *habeas corpus,* 151 Immigration Record). It is dated August 1, 1914.

This affidavit is on a par with all of the other affidavits. It cannot be dignified by the name of evidence. It is based upon such absurd statements as:

"It is commonly understood;" "according to general repute;" "it is understood;" "it has generally been accepted as a fact;" "no one was ever heard to deny."

Furthermore, the same objection as to deprivation of right of cross-examination and failure to give notice of the taking of the affidavit is urged as is contended with reference to the other affidavits.

The next curious document purports to be a petition of certain of the citizens of Colfax, dated July 29, 1914, addressed to the Secretary of Labor (Exhibit "III", p. 83, attached to petition for writ of *habeas corpus,* pp. 147-148, Immigration Record—see Appellant's Opening Brief, pp. 23-26). This petition contains the names of all of the persons who had given affidavits, some of them as many, as we have seen, as four affidavits, against the Katz brothers, and perhaps a few others. *It is not even sworn to.* It is the rankest kind of an information and belief paper, and would be inadmissible in any court of the land or in any other proceeding, administrative or otherwise, save possibly an immigration proceeding, where anything and everything seem to be admitted and accepted by some immigration officials in order to deport persons whom they deem undesirable aliens. The appeal to the Honorable Secretary of Labor is couched in such expressions as: "It has been a matter of common knowledge that they were profiting by the earnings of prostitutes;" and: "We, the undersigned, again *affirm our belief* of the guilt of Harry and Joseph Katz."

It must be evident that the use of such a petition must have inflamed the Immigration Officials at Angel

Island and had a deep prejudicial effect upon the Secretary of Labor and deprived the appellee of that full and fair hearing which "the eternal principles of justice and right" accord them. (Language used in *U. S.* v. *Redfern,* 180 Fed. 500.) The appellee and his brother are pictured as monsters and fiends, and such appeal could not have any effect other than to deeply prejudice their cause before the administrative officers at Angel Island and Washington, resulting in their unlawful deportation.

The next remarkable document, used against the Katz brothers, is a letter and brief, dated August 18, 1914, on the part of Frank V. Cornish, City Attorney of Berkeley, and special counsel for the Committee of Fifteen (Exhibit "JJJ", p. 85, attached to petition for writ of *habeas corpus,* 146 Immigration Record).

This brief is addressed to the Honorable Secretary of Labor and is in the nature of an appeal to the Honorable Secretary of Labor to deport the Katz brothers. It contains a severe criticism of the showing made by the attorneys for the Katz brothers. It purports to state *as facts matters not proved at all, either directly or by any just or legitimate inferences.* It furthermore apparently contains suggestions to the Examining Inspector or to the Commissioner of Immigration—certain suggestions as to what should be incorporated in the adverse recommendations of the Examining Inspector and of the Commissioner of Immigration such as: "Insert for emphasis just after remarks about representative men:" (Exhibit "JJJ", p. *88*: "Put in something about the men making affi-

davits being interested in saloons, or the friends of saloon men." (Exhibit "JJJ", p. *88.*)

This letter and brief of Attorney Cornish indulges in other severe invectives against the Katz brothers, but the great difficulty about the brief and letter is that it has no facts to support the abuse heaped upon the Katz brothers. But, aside from that, we respectfully submit that it was improper to admit such a brief and letter against the Katz brothers; that the pernicious activity of the special counsel for the Committee of Fifteen deeply prejudiced the cause of the Katz brothers in the minds of the Immigration Officials, and effectually deprived them of a fair and impartial hearing; that there is no authority in the immigration laws or rules of procedure for the employment and appearance of special counsel to assist the Immigration Officials; that such practice is evidence *per se* of unfairness and is most reprehensible. That the use of such brief constituted an unfair hearing under the law declared in *Ex parte Lam Fuk Tak,* 217 Fed. Rep. 468, *469.*

Such documents, and such tactics, permitted by the Immigration Officials, to be used against the appellee and his brother, undoubtedly prevented them from having that full, fair and impartial hearing which the laws of this country guarantee to the meanest and humblest person. As was well said in *Ex parte Plastino,* 236 Fed. R. 295, in a case involving deportation on the same charge of receiving, sharing in, or deriving benefit from the earnings of a prostitute: "Justice never hesitates

in according a fair hearing; on the contrary, guarantees it to the worst criminal."

The next affidavit, and *the last,* is that of Edward H. Horn, made August 1, 1914 (Exhibit "KKK", p. 90, attached to petition for writ of *habeas corpus,* p. 153, Immigration Record—see Appellant's Opening Brief, pp. 26-27). It is an exact duplicate of one of the many affidavits of Minnie G. Williams; perhaps a carbon copy; it is dated on the same day, to-wit, August 1, 1914. (Compare Exhibits "HHH" and "KKK", pp. 82-90.) It is subject to the same vices, such statements being permitted as "It was commonly understood;" "According to general repute;" "It is understood;" "No one was ever heard to deny."

The next document is a second adverse report and recommendation of Examining Inspector Griffiths, dated July 23, 1914. (Exhibit "LLL", p. 91, attached to petition for writ of *habeas corpus,* p. 166, Immigration Record—see Appellant's Opening Brief, p. 45.)

This document is subject to the same criticisms and objections urged to a previous adverse report and recommendation of Inspector Griffiths. (Exhibit "VV", p. 59.)

It should be explained, in this connection, that the cases were closed and submitted on June 19, 1914 (see Exhibit "WW", pp. 63-64). The records in both cases were sent on to Washington for consideration and action. Thereafter, the authorities in Washington expressed doubt as to the deportability of the Katz

brothers upon the evidence then presented, and called, from the Commissioner of Immigration, for further evidence and investigation "into the managerial relation of the Katz brothers to the house of prostitution in that town, of which Nellie White was the madam, in February last." (See Report and Recommendation of Examining Inspector Griffiths, of July 23, 1914, Exhibits "HH", "LL", pp. 39-40; see also proceedings at third and last hearing of September 2, 1914, Exhibit "CCC", p. 73, 141 Immigration Record.)

Insofar as this adverse report and recommendation purports merely to be an adverse report and recommendation it, of course, is unobjectionable as a matter of law, however false and fallacious may be the premises upon which it is based; but when this adverse report and recommendation purports to state certain matters, *as facts against the Katz brothers,* as the result of the private and secret investigations of the Examining Inspector then it becomes an offensive and vicious document inadmissible in any court of justice in the land; it is clearly hearsay information and belief, abounds in conclusions, opinions; the statements are those of a prejudiced and partisan officer; it is not sworn to; there is no cross-examination of the officer; he is not offered as a witness; such a document has no place in any proceeding, administrative or otherwise, where the liberty of a person is involved, especially where the penalty is as serious and irreparable as that of banishment.

Furthermore, the matters in the adverse report and

recommendation stated as facts against the appellee are not supported by any direct evidence or any evidence or circumstances testified to by witnesses from which any just and legitimate inferences against the appellant can be drawn.

Ex parte Lam Fuk Tak, 217 Fed. Rep. 468, 469.

In this connection, it should be stated that, when the officials at Washington ordered a re-investigation as to the managerial relation of the Katz brothers with reference to the place run by Nellie White, it was apparently directed to the ownership of the furniture and personal belongings in the house rented by Nellie White, the idea evidently being that, if the proofs showed that the Katz brothers had bought the furniture for the house, that would be evidence of the fact that they were connected with the management of such a place.

Outside of the conjectures and surmises of Examining Inspector Griffiths, and other matters stated by him, entirely unsupported by any evidence, it was affirmatively shown that neither one of the Katz brothers furnished the place, and that Joseph B. Katz had nothing to do with the place except in the mere capacity of landlord, such as paying water-bills, taxes, repairs, etc., as owner of the property.

The affidavit of George J. Meister, connected with the furniture store of Breuner & Company of Sacramento, effectually disposes of any pretense that the Katz brothers furnished the place as a house of ill-

fame for Nellie White. (See Exhibit "KK", p. 43, attached to petition for writ of *habeas corpus,* 132 Immigration Record.) His affidavit shows that Nellie White furnished the place herself. Both of the Katz brothers emphatically deny that they ever furnished the house for any such purposes.

This completes an examination of every single affidavit, or paper, offered against the appellee and disclosed to his attorneys.

The affidavits and evidence introduced on behalf of Harry Katz completely refute the two accusations made against him in the warrant of arrest. Some twenty-one affidavits of reputable citizens of Colfax, Sacramento, Stockton and San Francisco, were introduced as to his good character and the fact that he is a hard-working chiropodist, having a clientele in Sacramento, Stockton, Colfax and other interior towns. The evidence shows affirmatively that he moved from Colfax in 1910 and has since resided chiefly in Sacramento, but that he makes trips to Stockton, Colfax and other interior towns plying his trade as a chiropodist. He does not own the property, as to which the present controversy has arisen. He so swears and he is fully corroborated by his brother Joseph Katz, who swears that he alone owns the property. The property he did own in 1909, another and an entirely different piece of property, he has disposed of and this was prior to the passage of the amendatory act of March 26, 1910, which is not retroactive. Whatever financial arrangements he may have had with his brother, Joseph Katz, in lending him money to make

repairs or in paying for lumber bills, that fact of itself does not establish the charges alleged against him in the warrant of arrest.

Without further elaborating upon the voluminous record presented, we respectfully submit that, as is so appositely stated by Judge Connor in *Ex parte Lam Pui, supra,* "mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue."

Having disposed of the proposition that there is no evidence whatever worthy of the name to support the warrant of deportation, we also make the point that in the admission of the various affidavits, reports, documents, briefs, etc., the appellee was denied a fair and impartial hearing. That question has practically been considered and maintained in the previous pages of this Opening Brief. It is so interwoven with the absence of competent and legitimate evidence that to consider one is to consider the other.

We further invoke the doctrine enunciated in *Hanges* v. *Whitfield, supra,* and *Ex parte Lam Pui,* 217 Fed. Rep. 456, to the effect that the appellee was denied a full and fair hearing in failing to apprise him that he was entitled to the benefit of counsel at the *very outset* of the secret and preliminary hearing instead of at the *end* thereof.

As was said in *Ex parte Lam Pui,* 217 Fed. Rep. pp. 456, *465:*

> "Just why the inspector failed to inform petitioner, before subjecting him to the examination, of his right to have, and an opportunity to procure, counsel, is not easy to understand. Such

conduct is so utterly at variance with the course pursued by all judicial officers, both State and Federal, that it arrests the attention and jars the conception of fair procedure."

Several other matters, depriving the appellee of a fair and impartial hearing, could be also urged, but we are satisfied that we have demonstrated that there is no sufficient competent, or any, evidence to support either of the warrants of deportation against the Katz brothers.

Aside from these several palpable violations of what should constitute a full and fair hearing, it is well settled that the burden of proof is on the Immigration Officials.

U. S. ex rel. Castro v. *Williams,* 203 Fed. 155.

It is not sufficient to raise a doubt.

U. S. v. *Hom Lim,* 214 Fed. 456.

One cannot be deported on insufficient or illegal evidence.

Ex parte Yabucania, 199 Fed. 865.

Immigration Officials cannot act arbitrarily in refusing to believe persons sought to be deported or their witnesses.

U. S. v. *Lee Chung,* 206 Fed. 367;
In re Jew Wing Toy, 91 Fed. 240;
Wong Chung v. *U. S.,* 170 Fed. 182, 95 C. C. A. 198;
U. S. v. *Leung Sam et al.,* 114 Fed. 702.

"In determining whether aliens are entitled to admission, the Immigration authorities act in an

administrative and not a judicial capacity, and *must follow definite standards and apply general rules.*"

U. S. v. *Uhl,* 203 Fed. 152.

"Congress has seen fit to vest the final decision as to the right of aliens to enter the country in the Department of Commerce and Labor, but that department is governed by certain rules and regulations which must be *strictly construed* in conformity with the *eternal principles of justice and right.*"

"It is fundamental in American jurisprudence that every person is entitled to a fair trial by an impartial tribunal."

U. S. v. *Redfern,* 180 Fed. 500.

In the case of *U. S.* v. *Williams,* 185 Fed. 598, 599, District Judge Holt, after stating the usual procedure in deportation proceedings, says:

"It is, of course, obvious that such a method of procedure disregards almost every fundamental principle established in England and this country for the protection of persons charged with an offense. The person arrested does not necessarily know who instigated the prosecution. He is held in seclusion, and is not permitted to consult counsel until he has been privately examined under oath. *The whole proceeding is usually substantially in control of one of the inspectors, who acts in it as informer, arresting officer, inquisitor, and judge.* The secretary who issues the order of arrest and the order of deportation is an administrative officer who sits hundreds of miles away, and never hears or sees the person proceeded against or the witnesses. *Aliens, if arrested are at least entitled to the rights which such a system accords them; and, if they are deprived of any such right, the proceed-*

ing is clearly IRREGULAR, AND ANY ORDER OF DEPORTATION ISSUED IN IT INVALID."

The Immigration Officers must strictly follow the rules, which rules must not be inconsistent with established law.

U. S. v. *Williams,* 185 Fed. 598;
Roux v. *Commissioner of Immigration,* 203 Fed. 413;
Hanges v. *Whitfield,* 209 Fed. 675;
Ex parte Lam Pui, 217 Fed. 456;
Ex parte Lam Fuk Tax, 217 Fed. 468;
United States v. *Lou Chu,* 214 Fed. 463.

In *Ex parte Lam Pui,* 217 Fed. 456, District Judge Connor said:

"Those decisions establish the principle, so just and consistent with conceptions of American jurisprudence, that, before an alien admitted to the United States as a member of the exempt class can be deported, it must be shown by evidence, not merely suspicious circumstances or conjecture, that he has obtained such admission by means of fraudulent representations. Any other rule would be violative of elementary conceptions of justice and fair dealing. In the light of the language used by the courts, the validity of the return to the writ must be examined, not for the purpose of weighing or estimating the value of the evidence, but of ascertaining whether, when tested by well-settled principles, the examination had by the inspector constituted evidence upon which the Secretary of Labor had jurisdiction to order the deportation."

* * * * * * * *

"Long, and frequently sad, experience teaches that when officers intrusted with the administration of laws affecting the liberty of men are permitted to set aside and disregard those safeguards

which the wisdom of the ages have set up for the protection of liberty, in respect to those of one race or color, one creed or clime, it is but a short, and easily taken, step to do so when the liberty of the citizen is involved."

* * * * * * * *

"Inquisitorial methods of fixing guilt upon persons do not commend themselves to the minds of American lawyers or laymen. They are contrary to the genius of our institution."

"In *Harlam* v. *McGourin, supra,* Mr. Justice Day, quoting the language used in *Hyde* v. *Shine,* 199 U. S. 84, 25 Sup. Ct. 764, 50 L. Ed. 90, 'In the federal courts * * * it is well settled that upon *habeas corpus* the court will not weigh the evidence, although if there is an entire lack of evidence to support the accusation the court may order his (petitioner's) discharge,' says:

"'In so stating, the learned justice * * * was but affirming the rule well established under section 1014 that there must be some testimony before the Commissioner to support the accusation in order to lay the basis for an order of removal; otherwise, the accused could be discharged upon *habeas corpus,* although the court could not weigh the evidence when the record shows that some evidence was taken.'

"In *United States* v. *Williams,* 200 Fed. 538, 118 C. C. A. 632 (C. C. A., 2nd Circuit), Judge Noyes wrote the opinion for the court. Judges Coxe and Ward, thinking that their views upon this point were not expressed clearly, concurring, said:

"'The opinion does not, however, make entirely clear our views upon a single point. We think that some evidence must be presented to justify a judgment of deportation and that conclusions of law must have some facts upon which to rest. The immigrant may, in a sense, have a fair hearing, although the conclusions drawn by

the executive officers be wholly unsupported by proof.'

"Text-writers and judges have undertaken to define the word 'evidence,' as applicable to judicial investigations, with more or less success. Probably no more satisfactory definition is found, for practical purposes, than that given by Mr. Edward Livingstone:

" 'Evidence is that which brings to the mind a just conviction of the truth or falsehood of any substantive proposition which is asserted or denied,' Draft, Code.

"It is elementary that in judicial proceedings the question whether the record discloses any evidence is for the court. The weight to be given evidence is for the trier of the issue of fact. It is also elementary that mere suspicion, conjecture, speculation, is not evidence, neither can it be made the basis for finding a fact in issue. The industry of counsel affords a number of illustrative expressions of courts. In *People* v. *Van Zile,* 143 N. Y. 372, 38 N. E. 381, Andrews, Chief Justice, says:

" 'Suspicion cannot give probative force to testimony which in itself is insufficient to establish or to justify an inference of a particular fact.'

"Judge Caldwell, in *Boyd* v. *Glucklich,* 116 Fed. 131, 53 C. C. A. 451, well says:

" 'The sea of suspicion has no shore, and the court that embarks upon it is without rudder or compass.' "

In the leading case of *Low Wah Suey* v. *Backus,* 225 U. S. 460, it is said:

"A series of decisions in this Court has settled that such hearings before executive officers *may* be conclusive *when fairly conducted.* In order to successfully attack by judicial proceedings the conclusions and orders made upon such hearings it must be shown that the proceedings were *mani-*

> *festly unfair,* that the action of the executive officers were such as *to prevent a fair investigation* or that there was a *manifest abuse of the discretion* committed to them by statute." (Citing *United States* v. *Ju Toy,* 198 U. S. 253; *Chin Yow* v. *United States,* 208 U. S., p. 8; *Tan Tun* v. *Edsell,* 223 U. S. 673.) (Italics ours.)

In the case at bar, we contend that "the proceedings were *manifestly unfair";* "that the action of the executive officers were such as *to prevent a fair investigation";* and "that there was a *manifest abuse of discretion."*

But, aside from these questions of irregularities, divesting the proceedings before the Immigration Officials of that fairness required by the law of the land, the all important proposition for which we contend is that there is no sufficient or competent evidence whatever to support the warrant of deportation issued against appellee.

Mere suspicion or conjecture will not suffice, and the deportation of an alien upon suspicion or conjecture will justify a court in concluding that the order of deportation was arbitrary and unfair. These were the views announced in *Backus* v. *Owe Sam Gow,* 235 Fed. R. 849, by this Circuit Court of Appeals. At the risk of repetition, we again quote the language of that opinion, which we deem apposite to the case now presented for consideration to this Court:

> "But mere suspicion or conjecture were not sufficient upon which to base a judgment * * * In the absence of the best evidence attainable to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and

subject to judicial inquiry. (Citing *United States* v. *Ju Toy,* 198 U. S. 253, *260,* 25 Sup. Ct. 644, 40 L. Ed. 1140; *Chin Yow* v. *United States,* 208 U. S. 8, *12,* 28 Sup. Ct. 201, 52 L. Ed. 369; *In re Chan Kan,* 332 Fed. 855, *857*—C. C. C.—and cases therein cited.)"

Therefore, if this Honorable Court should conclude, as we confidently believe it must, that there is no evidence to sustain the warrant of deportation, *or* that the appellee did not have that "full and fair hearing" which the law and the rules and the decisions guarantee to an alien arrested on deportation charges, then the proceedings were "fatally irregular"; and the order of deportation based upon them was therefore *invalid;* and the detention of appellee under such order and warrant of deportation was *illegal;* and he was entitled to his absolute discharge as was held in the case of *United States* v. *Williams,* 185 Fed. Rep. 598, *604.*

We maintain that the judgment of the lower court, discharging the appellee upon the issuance of the writ of *habeas corpus* as prayed for in his petition, was eminently just and proper, and should be affirmed.

Respectfully submitted.

MARSHALL B. WOODWORTH,
Attorney for Appellee.